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Via Overnight Mail

The Honorable Mathy Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response
Mail Code: 5101T
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Lower Passaic River Study Area

Dear Assistant Administrator Stanislaus:

Thank you for meeting with representatives of the Lower Passaic River Superfund Site Cooperating Parties Group (CPG) on January 31, 2014. We appreciated your time and the opportunity to convey our views to you and your staff regarding EPA's Focused Feasibility Study (FFS) and to explain the CPG's Sustainable Remedy alternative.

During our discussions, I emphasized that the FFS is inconsistent with the National Contingency Plan (NCP). I would like to take this opportunity to explain the reasons for my statement. Please note that the CPG has not seen the current form of the FFS; therefore, our understanding is based upon the 2007-draft version that was issued and subsequent updates that have been provided to the CPG and the community advisory group (CAG).

The FFS remedy is an anomaly; it is not an interim action and it does not comply with the NCP provisions regarding early actions. Moreover, it is duplicative of and at odds with the NCP-compliant remedial investigation/feasibility study (RI/FS), which EPA directed the CPG to perform pursuant to the May 2007 RI/FS AOC (AOC). Pursuant to that AOC, and at great expense to the CPG, the CPG undertook the RI/FS for the purpose of selecting a final remedy not only for the lower eight miles, but also for the entire 17-mile Lower Passaic River Study Area (LPRSA). There simply is no provision of the NCP that allows for two duplicative studies, both focused on the same geographic area and both with the same goal of identifying a final remedy for the same geographic area.



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Interim/Early Action

At the time the CPG entered into the AOC, the CPG understood that interim or early actions were being considered by Region 2. In the AOC, Region 2 acknowledged that it was "evaluating interim remedial measures or interim or final early action alternatives" and that "implementation of any such action may result in the need to resequence certain RI/FS field investigation activities." However, when the draft FFS was released in June 2007, only one month after the CPG signed the AOC, it proposed alternatives for a final remedy for the entire lower eight miles of the LPRSA. From that point on to the present, there were two separate overlapping studies, both having the objective of selecting a final remedy for the lower eight miles of the LPRSA. Nothing in the NCP authorizes such duplication.

The NCP provides for "early" actions under the following conditions: "[s]ites should generally be remediated in operable units when early actions are necessary or appropriate to achieve significant risk reduction quickly, when phased analysis and response is necessary or appropriate given the size or complexity of the site, or to expedite the completion of the total site cleanup." 40 CFR § 300.430(a)(ii)(A). As outlined below, the FFS does not meet any of these conditions.

First, the FFS no longer qualifies as an early action, seven years after its initial release and less than one year prior to completion of the RI/FS for the entire 17 miles. In addition, the FFS will not "achieve significant risk reduction quickly," as required by the NCP. Based upon the Region's own modeling results, the FFS will not achieve significant risk reduction for at least 15 years. To the contrary, the CPG's modeling results indicate that disturbing buried material that would not otherwise be disturbed will actually increase risk in the short-term. Furthermore, dredging and capping the entire lower eight miles of the River will not expedite the total site cleanup. Based upon lessons learned from the removal action that the CPG is currently completing near river mile (RM) 10.9, there are significant access, infrastructure and utility easement issues that will require substantial time, energy and effort to address. These issues have not been fully considered; as a result, the dredging and duration estimates in the FFS are unrealistically short and unachievable. The CPG's feasibility study estimates that a bank-to-bank dredge and cap of the lower eight miles would take approximately 20 years. This approach simply cannot result in an expeditious cleanup. Moreover, the FFS will prevent expeditious completion of total site cleanup as EPA will have no companies willing to perform the work. The FFS will inevitably lead to wasteful and time consuming litigation which can easily be avoided by following the NCP and completing the RI/FS.

Second, the NCP expressly provides that when considering an "early" action, such "[o]perable units, including interim action operable units, should not be inconsistent

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with nor preclude implementation of the expected final remedy.” 40 CFR § 300.430(a)(ii)(B). The bank-to-bank alternatives in the FFS are inconsistent with the type of targeted, adaptive management approach that is supported by EPA guidance. See EPA’s 2002 Principles for Managing Contaminated Sediment Risks at Hazardous Waste Sites, OSWER Directive 9285.6-08; EPA’s 2005 Contaminated Sediment Remediation Guidance for Hazardous Waste Sites, OSWER Directive 9355.0-85. Moreover, proceeding with the FFS now would effectively eliminate any remedy other than bank-to-bank before the RI/FS process has concluded. The possibility of having two conflicting remedies for the same geographic area resulting from two different processes demonstrates the fallacy of dual studies with the same purpose.

Duplicative Processes

The preamble to the NCP is instructive on the need to avoid duplication of effort. In response to commenter concerns about multiple and overlapping RI/FSs at operable units, the preamble provides that “duplication of efforts on RI/FSs should be avoided” and “[n]o duplication of investigatory or analytical efforts should occur when selecting an operable unit for a site.” 55 FR 8666 (emphasis added). EPA has not established a separate operable unit for the lower eight miles that is the subject of the FFS. The lower eight miles are part of operable unit three of the Diamond Alkali Superfund Site. Operable unit three is the subject of the RI/FS being performed by the CPG pursuant to the AOC, in compliance with the NCP and under EPA oversight. Even though the lower eight miles is not a separate operable unit, EPA is performing an overlapping study and is duplicating investigatory work within the same operable unit.

The RI/FS Process

Remedy selection for the lower eight miles should be made pursuant to the RI/FS, particularly when the RI/FS is scheduled to be completed by the end of the year (with the Region’s support). In the RI/FS AOC, EPA agreed that the work to be performed by the CPG “shall provide all appropriate and necessary information to assess [LPRSA] conditions and evaluate alternatives to the extent necessary to select a remedy that will be consistent with CERCLA . . .” for the entire 17 miles (emphasis added).

“The purpose of the remedial investigation (RI) is to collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives.” 300.430(d)(1) (emphasis added). The RI is underway pursuant to the NCP and an AOC for the entire 17-miles. As part of the RI/FS, EPA has continued to collect data at significant cost to the CPG. The data is needed to characterize the site for the purpose of developing remedial alternatives for the 17-mile study area. However, EPA’s FFS does not comport with the RI process set forth in the

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NCP; the FFS does not rely upon all of the RI data nor has EPA used all of the RI data to run its models. See *Washington State Dep't of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793 (9th Cir. 1995) (finding that a state entity did not comply with the standard process of the NCP, and as a result, its costs were inconsistent with the NCP). For example, fully validated data from Supplemental Sampling Program 2 (SSP 2), including data collected in the lower eight miles, is not yet available. Yet, EPA has determined that this data is necessary to complete the RI/FS. EPA cannot demand data for use in the remedial alternatives evaluation for the RI/FS and not fully consider the same data for the FFS, particularly, when the flawed objective of the FFS is to evaluate remedial alternatives for the same segment of the River.

Furthermore, the NCP provides that "[t]he development and evaluation of alternatives shall reflect the scope and complexity of the remedial action under consideration and the site problems being addressed. Development of alternatives shall be fully integrated with the site characterization activities of the remedial investigation" 40 CFR § 300.430(e)(1). The FFS alternatives are not fully integrated with the comprehensive site characterization. As discussed above, serious issues involving recontamination from ongoing sources, implementability, project duration, and recent SSP 2 data could not have been adequately considered in the FFS. The FFS, in essence, proposes a remedy in a vacuum. Eight miles of sand cannot remain "clean" in a tidal estuary when the upper 9 miles and Newark Bay are not addressed.

Finally, cost-effectiveness is part of the remedial alternatives evaluation and must be given consideration. "Each remedial action selected shall be cost effective. . . . A remedy shall be cost effective if its costs are proportional to its overall effectiveness." 40 C.F.R. § 300.430(f)(1)(ii)(D). See also *U.S. v. Am. Cyanamid Co.*, 786 F.Supp. 152 (D.R.I. 1992) ("The NCP directs EPA to prospectively choose a remedial action that EPA believes will clean-up the site for the least cost"). To determine whether the costs are proportional to a remedy's overall effectiveness, the preamble to the NCP recommends the following comparative analysis: "In comparing alternatives to one another, the decision-maker should examine incremental cost differences in relation to incremental differences in effectiveness." 55 Fed. Reg. 8728. Based upon the Region's own modeling data, the FFS alternatives are projected to be only marginally protective, but at significantly greater cost (estimated to be in the billions of dollars). In reality, based upon the foregoing flaws, it is doubtful that the FFS remedy will achieve the levels Region 2 believes to be protective. The Sustainable Remedy offers an alternative that is expected to achieve protectiveness. Moreover, as an interim measure (consistent with EPA's adaptive management guidance), the Sustainable Remedy would allow for additional work, if needed. The result is that EPA could waste billions of dollars on a remedy that is not protective and, therefore, not cost effective.

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Conclusion

For these reasons, the CPG firmly believes the FFS is inconsistent with the NCP. As a result, and as we have repeatedly advised Region 2 and Headquarters, the CPG will not perform the FFS. The CPG believes that the Sustainable Remedy is fully consistent with the NCP and EPA guidance. We therefore respectfully request that EPA Headquarters maintain an active role in the decision making process related to the LPRSA. To ensure the selection of a remedy pursuant to an NCP-compliant process, the CPG respectfully requests that Headquarters urge Region 2 to allow the CPG to complete the RI/FS of the full 17-mile study area and urge Region 2 to give full and fair consideration to the Sustainable Remedy, as it is an opportunity for progress instead of protracted delay. We would welcome the opportunity for a continuing dialogue with Headquarters regarding a path toward progress in the River.

Very truly yours,


William H. Hyatt, Jr.
Coordinating Counsel for the CPG

cc: Lisa Feldt, Associate Deputy Administrator
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